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Nos. 02-1574 and 02-1624

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, Superintendent,
Petitioners,

v.

MICHAEL A. NEWDOW, *et al.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES' AND ELK GROVE SCHOOL DISTRICT, ET AL.'S PETITIONS FOR WRITS OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than

[1] Pursuant to Supreme Court Rule 37.2(a), *amicus* has received consent to file this brief from counsel for the petitioners and the respondent *pro se*. The original letters of consent have been filed with the Clerk of Court. No part of this brief was authored by a party or counsel for a party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

2,600,000 current and former members of our armed services, and long has worked to foster patriotism in general and respect for our nation's flag in particular. The Legion was chartered as a corporation in 1919 by Act of Congress. Act of September 16, 1919, ch. 59, 41 Stat. 284 (current version at 36 U.S.C. §§ 21701-21708 (2000)). The Legion's statutory purposes include upholding and defending the Constitution and supporting its members' service to their country. 36 U.S.C. § 21702 (2000).

The Legion has a long-standing interest in the Pledge of Allegiance to the Flag ("Pledge"). The Legion convened the first National Flag Conference in Washington, D.C. in June 1923. At that conference, which was attended by President Harding, the words of the Pledge were changed from, "I pledge allegiance to my Flag . . ." to "I pledge allegiance to the Flag of the United States . . . ." *See* The Flag Code, adopted at the Nat'l Flag Conf., at 4 (Washington D.C., June 14-15, 1923). At a second National Flag Conference the following year, the Director of the Legion's National Americanism Commission, Garland W. Powell, was elected Permanent Chairman of the Conference. At the 1924 Conference, the words of the Pledge were changed from ". . . Flag of the United States" to ". . . Flag of the United States of America . . . ." *See* Summ. of Proceedings of the All Americanism Conf. called by the Nat'l Americanism Comm'n of the American Legion, at 2 (Washington D.C., May 15-17, 1924).

The Legion also was active in securing enactment of the statute here under challenge—the Act of June 14, 1954, Pub. L. No. 396, ch. 297, 68 Stat. 249 ("1954 Act")—which added the words "under God" to the Pledge, 4 U.S.C. § 4 (2000). *See, e.g.*, American Legion, Nat'l Exec. Comm. Res. 72 (May 1954) (supporting inclusion of "under God" in the Pledge). This case, which implicates the constitutionality of the 1954 Act and the Pledge as amended thereby, raises important

issues about our society and our Constitution. Its implications transcend the interests of the parties and are of great importance to the Legion and its members.

There is no religious test for Legion membership. *See* 36 U.S.C. § 21703 (2000) (establishing honorable service in the armed forces during any listed period of hostilities as membership requirement). Nor has the Legion polled its members as to their religious beliefs. In all likelihood, though, some of the Legion's more than 2.6 million members do not believe in a single Supreme Being. But this case is neither about religion nor an establishment of religion. Rather, it is about patriotism, and about the propriety of the government's encouraging Americans to honor their country and its symbol—the American Flag.

SUMMARY OF ARGUMENT

Review is merited in this case. The decision below held that the presence of two words—"under God"—transformed the recitation of the Pledge from an expression of patriotism into a "religious act" that violates the Establishment Clause when voluntarily recited by public school students pursuant to school district policy. The court of appeals' judgment is inconsistent with this Court's precedent and creates a split in the circuits. The two-member majority opinion was flanked by dissent from other members of the Court of Appeals for the Ninth Circuit, state leaders, the United States Senate, and even the President. The issues presented by this case are of obvious national import.

The court of appeals arrived at its judgment through application of this Court's school prayer precedents. The majority's conclusion that the school district's policy impermissibly coerces a religious act is founded on an erroneous premise. The Pledge is not a prayer and its recitation does not constitute a religious act. The Pledge is no more a religious act than such other acknowledgments of this

country's religious heritage as the national motto "In God We Trust," the references to the Creator in the Declaration of Independence, or references to God in "The Star Spangled Banner."

The Pledge has the secular purpose of promoting patriotism. Even with the words "under God," it is not an endorsement of religion. To the contrary, it has been characterized by this Court as consistent with the Establishment Clause. Nor does the school district's policy of voluntary Pledge recitation in classrooms lead to excessive government entanglement with religion.

ARGUMENT

I. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

The United States' and Elk Grove School District, et al.'s petitions for writs of certiorari should be granted for three reasons:

First, the court of appeals decided an important federal question in a way that conflicts with relevant decisions of this Court. The panel majority held that recitation of the Pledge violated the "coercion test" announced by this Court in the school prayer case *Lee v. Weisman*, 505 U.S. 577 (1992). Appendix to the United States' Petition for Certiorari (No. 02-1574) ("Appendix") 11a ("we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional"). Recitation of the Pledge, as amended by the 1954 Act, is neither a prayer nor a religious act. It is a secular, patriotic part of our national heritage. As this Court noted in *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989), "[o]ur previous opinions have considered in dicta the motto ["In God We Trust"] and the pledge [with the phrase "under God" added by the 1954 Act], characterizing them as consistent with the

proposition that government may not communicate an endorsement of religious belief." Moreover, in *Lynch v. Donnelly*, the Court observed that "the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag . . . recited by thousands of public school children—and adults—every year" is a "reference to our religious heritage" in the same vein as "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers." *Lynch*, 465 U.S. 668, 675, 676 (1984). Under the decisions of this Court, the Pledge does not run afoul of the Establishment Clause.

Second, the court of appeals' judgment conflicts with that of another court of appeals that has addressed the same issue. Specifically, the panel majority decided that the school district's policy of non-compulsory recitation of the Pledge, including the words "under God," violates the Establishment Clause. Appendix 17a-18a. The Court of Appeals for the Seventh Circuit has ruled to the contrary. *Sherman v. Community Consol. School Dist. No. 21*, 980 F.2d 437 (7th Cir. 1992).

Third, the case involves a rule of nationwide application and an issue of national importance. The very day the Ninth Circuit's original opinion was issued, the United States Senate unanimously adopted a resolution decrying the ruling. S. Res. 292, 107th Cong., 2nd Sess., 148 Cong. Rec. S6105-06 (daily ed. June 26, 2002) (99-0 vote). The President of the United States expressed dismay as well. The White House, Office of the Press Secretary, "White House Reaction to Circuit Court Ruling" (June 26, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/06/print/20020626-8.html/ (as of June 27, 2002). Subsequently a letter signed by the attorneys general of forty-eight states and two territories was filed with the Ninth Circuit in support of rehearing. Letter from Alan G. Lance, Attorney General, State of Idaho, et al. to Cathy A. Catterson, Clerk, U.S. Court

of Appeals (July 25, 2002). The Pledge, whose wording is established by federal law, is recited by millions of Americans daily. The court of appeals' decision alters the Pledge's wording for public school students in nine states, while citizens in the rest of the nation, and citizens in the Ninth Circuit who attend non-school ceremonial functions, recite the Pledge enacted by Congress. Such a schism in the recitation of our national Pledge merits review.

II. NEITHER THE 1954 ACT, NOR THE PLEDGE AS A WHOLE, NOR THE SCHOOL DISTRICT'S DAILY RECITATION POLICY VIOLATES THE ESTABLISHMENT CLAUSE.

"Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST., amend. I. The same stricture applies, through the Due Process Clause of the Fourteenth Amendment, to state and local governments. *Everson v. Bd. of Education*, 330 U.S. 1 (1947). The Establishment Clause is directed not against every government action or activity that might "'happen[] to coincide or harmonize with the tenets of some . . . religions,'" *Lynch*, 465 U.S. at 682 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)), but against "'sponsorship, financial support, and active involvement of the sovereign in religious activity,'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). Moreover, no "school can persuade or compel a student to participate in a religious exercise." *Lee*, 505 U.S. at 599.

Under *Lemon*, the test of whether there is an Establishment Clause violation has three prongs:

First, does the challenged statute or activity have a secular purpose? *Lemon*, 403 U.S. at 612. There is no violation if the purpose is at least partly secular, *Lynch*, 465 U.S. at 680-81 & n. 6; *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002) (requiring plausible secular purpose), so long as the supposedly secular purpose isn't a sham, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308-10 (2000).

Second, does the activity's principal or primary effect endorse or inhibit religion? *Lemon*, 403 U.S. at 612. In order to pass muster, it must do neither when considered in its overall context, *see Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring), and from the viewpoint of an informed and reasonable observer, *American Family Ass'n*, 277 F.3d at 1122.

Finally, does the activity foster "'an excessive government entanglement with religion'"? *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674); *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Such entanglement violates the Establishment Clause. A statute or activity that fails any prong of the *Lemon* test cannot stand. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The "endorsement" test, first articulated by Justice O'Connor in *Lynch v. Donnelly*, essentially combines the first two prongs of the *Lemon* test. It holds that the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

In its revised opinion, the court of appeals applied the "coercion" test of *Lee v. Weisman* to hold the school district's policy of voluntary Pledge recitation unconstitutional. Once it found that the school district's policy failed that test, the court did not consider the endorsement test or the *Lemon* test. Appendix 11a. The court of appeals held: (1) that teacher-led recitation of the Pledge "impermissibly coerces a religious act," and (2) "[i]n light of Supreme Court precedent," "the

school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause." Appendix 11a, 17a. Although the panel majority expressly declined to decide the constitutionality of the 1954 Act, Appendix 18a, by necessary implication the judgment held the 1954 Act unconstitutional as applied to public school students in the Ninth Circuit.

A. This case involves neither compulsory recital of the Pledge nor compulsory presence at a government-sponsored religious activity.

Contrary to the court of appeals' majority opinion, there is no Establishment Clause violation in this case. In the first place, Dr. Newdow's daughter is not being required to recite the Pledge, Appendix 4a, so the compulsion that actuated the Court in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), is absent here. Were the Pledge a prayer, of course, even permitting objectors to absent themselves would not avoid an Establishment Clause violation, in part because prayer is inherently religious. *Lee*, 505 U.S. at 597-99 (prohibiting prayers offered by clergy at public school graduations); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (prohibiting teacher-led prayers in public schools regardless of whether students are compelled to recite them).

But the Pledge is not a prayer. It is a patriotic celebration of Nation and Flag.

> Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and virtues out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.

Sherman, 980 F.2d at 444 (emphasis in original).

This Court, in striking down the Regents' Prayer in *Engel v. Vitale*, said that—

> there is . . . nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express *love for our country* by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such *patriotic or ceremonial occasions* bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Engel, 370 U.S. at 435 n. 21 (emphasis added).

For this reason the concerns about requiring public school students' participation in a "religious exercise" that motivated the Court in *Lee*, 505 U.S. at 592-97, and the majority below, do not obtain here. *Lee* is limited by its "dominant facts," which involved "formal religious exercise" at a high school graduation ceremony. *Id.* at 586. That the facts involved prayer "control[led] the confines" of the holding in *Lee*. *Id.* Indeed, as Justice Scalia observed in his dissent, even though the students recited the Pledge, with the words "under God," at the graduation ceremony, only the prayer ran afoul of the Establishment Clause. *Id.* at 638-39 (Scalia, J., dissenting); *see id.* at 583 (opinion of the Court noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers."). And as Judge O'Scannlain observed in his dissent from the denial of rehearing *en banc* below, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a

context of state-sanctioned formal religious observances." Appendix 78a-79a. The panel majority extended this Court's school prayer cases to the Pledge only by "obfuscat[ing] the nature of the exercise at issue." Appendix 79a.

B. The Pledge satisfies the test set forth in *Lemon v. Kurtzman*.

Moreover, the amended Pledge satisfies each prong of the test enunciated in *Lemon v. Kurtzman* and thereby passes the "endorsement" test discussed by the Court in *County of Allegheny*, 492 U.S. at 592-94.

1. *The Pledge, the 1954 Act, and the school district's recital policy have secular purposes.*

As originally enacted into federal law, the Pledge read: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.[2] Indisputably the 1942 version had a secular purpose, for it contains no reference to anything of a religious character. Congress's addition of "under God" also had a secular purpose, namely distinguishing the United States—a religious nation, *see Zorach v. Clauson*, 343 U.S. 306, 313 (1952)—from its communist political adversaries, *Engel*, 370 U.S. at 440 (citing and quoting from legislative history of 1954 Act); *see Lynch*, 465 U.S. at 682 (secular purpose not vitiated because it may coincide with tenets of some religions).[3] References such as that in the Pledge "are uniquely suited to serve such wholly

[2] The Pledge dates to 1892 but was not enacted into federal law until fifty years later.

[3] Absent evidence to the contrary, a court should accept the purpose(s) set out in the text or legislative history of the statute or practice under review. *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment).

secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases." *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting).

Further, context is highly relevant under *Lemon*. The school district's policy calls for recital of the *entire* Pledge, not merely the words added by the 1954 Act, and it is the full text of the Pledge that is the proper measure of whether the activity has a secular purpose. *See County of Allegheny*, 492 U.S. at 595-97 & n. 46 (Blackmun and Stevens, JJ.) (stating that "the effect of the government's use of religious symbolism depends upon its context"); *Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring) (concluding that inclusion of creche in city's Christmas display was not an endorsement of religion in part because creche was displayed along with "purely secular symbols").[4] Indeed, Dr. Newdow himself concedes that the intent behind the school district's policy of Pledge recital is "the secular purpose of fostering patriotism." Appendix 49a.

The Pledge is secular in purpose. Although the relevant inquiry is the nature of the Pledge as a whole, even the 1954 Act has a secular purpose because the words it added appear amid secular, patriotic phrases and were added to distinguish this nation from communist regimes. Hence the first *Lemon* prong is satisfied.

[4] *Wallace's* focus on the Alabama act adding "or voluntary prayer" to an existing moment-of-silence statute is not to the contrary because the addition of "under God" to the Pledge was motivated by a desire to foster patriotism, not (as in *Wallace*) religion or prayer. *See Engel*, 370 U.S. at 440 (citing and quoting from legislative history of 1954 Act); *Wallace*, 472 U.S. at 78 n. 5 (O'Connor, J., concurring in the judgment) (suggesting that the 1954 Act merely acknowledges, rather than endorses, the presence of religion in American life).

2. *The Pledge, the 1954 Act, and the school district's recital policy neither endorse nor inhibit religion.*

The second *Lemon* prong, and the emphasis of the endorsement test, is whether the state-sponsored activity can be considered an endorsement of religion. *County of Allegheny*, 492 U.S. at 592-94; *Lemon*, 403 U.S. at 612. Neither the addition of "under God" nor the school district's policy that the Pledge be recited (though recital is not compulsory for Dr. Newdow's daughter or any other student) has the purpose or effect of endorsing religion as opposed to agnosticism or atheism. This is especially so when compared to activities this Court has ruled permissible under the Establishment Clause. These include praying at the opening of state legislative sessions, *Marsh v. Chambers*, 463 U.S. 783 (1983), the First Congress's appointing paid chaplains contemporaneously with its approval of the language of the Bill of Rights, *id.* at 787-91, "printing . . . 'In God We Trust' on coins, . . . opening court sessions with 'God save the United States and this honorable court,'" and including a creche or menorah as part of a municipality's overall Christmas holiday display, *Lynch*, 465 U.S. at 690-93; *County of Allegheny*, 492 U.S. 573.

> These government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Lynch, 465 U.S. at 693.

Even Justice Brennan, who was "among the most stalwart of separationists," *Sherman*, 980 F.2d at 447, conceded that—

> [w]e have simply woven the [national] motto [In God We Trust] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. *The reference to divinity in the revised pledge of allegiance*, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

Abingdon School Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (emphasis added). Elsewhere in the same opinion, Justice Brennan took note of the claim that the Bible reading there at issue had secular purposes (i.e., fostering tolerance and harmony among the students; inspiring better discipline). *Id.* at 280-81. Even were that so, he continued, he could see no reason why that secular purpose could not be fulfilled by such *non-religious* activities as "daily recitation of the Pledge of Allegiance." *Id.* at 281 (emphasis added).

In 1989, five justices noted that the Court has characterized the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief" and that "there is an obvious distinction between creche displays," on the one hand, "and references to God in the [national] motto and the pledge," on the other. *County of Allegheny*, 492 U.S. at 602-03. Thus, said the Court, including a menorah—admittedly a religious item when considered by itself—in a holiday display does not mean that

the municipality "has endorsed religious belief over nonbelief." *Id.* at 618. Similarly, including "under God" in the secular Pledge does not mean that the federal government has endorsed religious belief over nonbelief, and adopting a policy of Pledge recital does not mean that the Elk Grove school district has made such an endorsement, either. Thus there is no violation of the second prong of *Lemon*.

3. *The Pledge, the 1954 Act, and the school district's recital policy do not lead to excessive government entanglement with religion.*

The final *Lemon* prong is whether the activity leads to excessive government entanglement with religion or religious activity. *Lemon*, 403 U.S. at 612-13; *Agostini*, 521 U.S. at 233. There is no entanglement issue here. This Court has held that excessive entanglement does not occur where the government reviews religious grantees' adolescent counseling programs, *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988), or audits categorical grants to religious colleges to ensure that they're not used to teach religion, *Romer v. Bd. of Public Works*, 426 U.S. 736, 764-65 (1976). Here, there is no government followup beyond the possibility that a principal occasionally may check whether the Pledge is being recited in her school's classrooms. The level of involvement thus is less than what has been permitted by this Court and the third *Lemon* prong presents no problem.

Thus the Pledge, the 1954 Act, and the school district's recital policy satisfy all three *Lemon* prongs: First, the principal purpose of the statutes and activity is patriotic and hence secular. Second, there is no endorsement of religion despite the reference to God. Finally, there is no potential for excessive entanglement of the government in religious activity, both because no such activity is present and because the likelihood of government involvement in overseeing the school district's recital policy is negligible.

CONCLUSION

For the foregoing reasons, as well as those advanced by the parties petitioning for certiorari, this Court should grant the petitions for certiorari, and should reverse the judgment of the Court of Appeals for the Ninth Circuit.

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